No. 89-781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE TOWN OF HUNTINGTON, THE COUNTY OF SUFFOLK, THE COUNTY OF NASSAU, THE TOWN OF NORTH HEMPSTEAD, THE TOWN OF OYSTER BAY, and ROBERT J. MRAZEK,

Petitioners,

—against—

JOHN O. MARSH, JR., Secretary of the U.S. Army, LT. GENERAL JOSEPH K. BRATTON, Chief of the Corps of Engineers, COLONEL C.E. EDGAR III, District Engineer, Army Corps of Engineers, New England Division, and DEPARTMENT OF THE ARMY CORPS OF ENGINEERS OF THE UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

Petitioners respectfully submit this Reply Brief in support of their petition for a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Second Circuit filed August 14, 1989, and in reply to the Brief for the Respondents in Opposition filed January 12, 1990.

REPLY ARGUMENT

A. This Case Is an Appropriate Vehicle for This Court's Review of Important Issues Pertaining to a District Court's Equitable Discretion to Issue Injunctive Relief for Violations of NEPA. The Fact That Respondents Have Violated More Than One Statute and Have Already Caused Injury Does Not Obviate the Need for an Injunction to Cure the NEPA Violation and Prevent Present and Prospective Injuries.

Although conceding that the petition for certiorari in this case "involves an important question of federal law" (Opp. at 6),[1] respondents argue that this particular case is an inappropriate vehicle for this Court's resolution of that important question. Respondents' objections to the petition are unfounded.

First, this case presents a unique opportunity for this Court to address a fundamental legal issue regarding the standards for equitable relief in NEPA cases. That issue is whether petitioners are entitled to injunctive relief based upon respondents' violation of NEPA's procedural provisions alone, or whether an additional showing of environmental injury is needed. As stated in the petition for certiorari, the court of appeals overreached its authority as a matter of law when, requiring petitioners to prove actual or threatened harm to the environment, it vacated the district court's injunction prohibiting ongoing violations of NEPA. The court of appeals acted contrary to the purposes of the statute, as detailed in this Court's opinions in *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1857-58 (1989), and *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1846 (1989). Furthermore, the court of appeals' foreclosure of the district court's equitable discretion to grant or withhold injunctive relief contravenes the principles stated by this Court in *Weinberger v. Romero-Barcelo*, 456 U.S. 305

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1 References in the form "(Opp. at _____)" refer to pages of the Brief for the Respondents in Opposition. References in the form "(Pet. App. A _____)" refer to pages of the Appendix to the Petition for a Writ of Certiorari.

(1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). And, as conceded by respondents, the court of appeals' imposition of an "environmental harm" requirement in NEPA cases is in conflict with decisions of other courts of appeals which "articulate a broader theoretical basis upon which to predicate irreparable injury under NEPA. . . ." (Opp. at 7). *See Sierra Club v. Marsh*, 872 F.2d 497, 499 (1st Cir. 1989); *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985); *Massachusetts v. Watt*, 716 F.2d 946, 951-52 (1st Cir. 1983); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1005-06 (5th Cir. 1981); *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512-13 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975); *Environmental Defense Fund, Inc. v. Froehlke*, 477 F.2d 1033, 1037 (8th Cir. 1973); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1183-84 (6th Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972).[2]

Second, respondents attempt to minimize the conflict between the decision in the court of appeals and the cited cases from other circuit courts because this case involves a violation of the Ocean Dumping Act, a substantive environmental statute, in addition to a NEPA violation. (Opp. at 8). Certainly however, respondents' violation of the Ocean Dumping Act cannot undo the harm caused by their NEPA violation. As repeatedly stated by this Court, NEPA is essentially procedural, and its policies and objectives are distinct from any substantive environmental statute. As the majority of circuits has held, a

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2 Without explanation, respondents dismiss all authorities cited by petitioners which "predate this Court's decisions in *Amoco Production Co.* . . . and *Weinberger* . . ." (Opp. at 6 n.5). Respondents fail to point out what new principles of law were announced in those decisions, which themselves purport to reaffirm the traditional equitable discretion of a district court to grant or withhold injunctive relief based on statutory violations. Respondents' implicit assumption that *Amoco Production Co.* and *Weinberger* render all prior authority meaningless is particularly puzzling because those cases do not, unlike the cases cited by petitioners, involve injunctions based on ongoing violations of NEPA.

NEPA violation is unique, and may warrant an injunction without regard to requirements for an injunction based on other violations. The court of appeals' offhand conclusion to the contrary (Pet. App. A12 n.1) is in itself sufficient reason for this Court to grant certiorari.

Next, respondents argue that because they had dumped dredged spoils in violation of the law for six years and the district court's prohibition of further illegal dumping could not restore the disposal site to its pre-disposal condition, the district court's issuance of the injunction was unreasonable. (Opp. at 8-9). Assuming for the sake of argument that respondents' peculiar scientific assumptions have any validity, respondents are once again arguing that because their violation is more egregious than the typical violation in "pure NEPA cases," the rationale for injunctive relief in those cases is inapplicable here. Petitioners believe that this reasoning is unacceptable. Such a rule would encourage an agency to adopt a policy of "act first, comply later" as the most expedient policy. In any event, the rationale applicable to injunctive relief in NEPA cases is the precise issue which this Court needs to address by way of plenary review after issuing a writ of certiorari.

B. The Issues Presented for Review on Certiorari Are Not Moot.

The dumping of dredged spoils at the WLIS III site in violation of NEPA and the Ocean Dumping Act continues. Respondents nevertheless make a *prospective* mootness argument, by promising to render a new site designation decision sometime after April 1990. (Opp. at 10).

It is well settled that a respondent may not moot this Court's review of an injunction prohibiting a violation of the law merely by promising future compliance. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Respondents' promise to conform their actions to the law in this case is immaterial for several additional reasons. Since March 1988, the disposal of dredged spoils at the WLIS III site has been declared in violation of NEPA and the Ocean Dump-

ing Act. (Pet. App. A20-36). If respondents had believed they could moot this case by complying with the law, they should have done so then.[3]

Moreover, as respondents themselves point out (Opp. at 10), the policies underlying NEPA do not permit a district court to enjoin agency action "permanently," but allow the court to enjoin the agency action only pending its compliance with the procedures mandated by the statute. Thus, every controversy involving injunctive relief based on a NEPA violation is necessarily of short duration and clearly falls within the category of cases involving "short term orders, capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1977). Respondents in this case should not be allowed to insulate from this Court's review the erroneous ruling of the Second Circuit regarding injunctive relief simply by representing that they will re-evaluate their prior illegal designation decision.

Finally, a new designation decision would not moot the importance of the issues presented for this Court's review. In their draft supplemental EIS released on December 12, 1989, respondents have again recommended a decision favoring the continued use of WLIS III as a dredged materials disposal site. Thus, it appears more than likely that respondents will continue to use WLIS III as a disposal site. Given the erroneous decision of the Second Circuit, respondents will be free to do so regardless of their compliance with NEPA's procedural mandate. Petitioners will have no effective remedy to enforce compliance with NEPA and thus no motive to challenge an agency violation, no matter how blatant. In short, regardless of respondents' promised compliance, a real controversy exists.

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3 Respondents have made a similar representation before. In June 1989, during oral argument on their second appeal to the court of appeals, respondents represented that a draft supplemental environmental impact statement would be released on October 16, 1989. (Pet. App. A7). That document, however, was not released until December 12, 1989.

CONCLUSION

Certiorari should be granted to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
January 24, 1990

Respectfully submitted,

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